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NOT FOR PUBLICATION

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Judy Christoffersen,

10 Plaintiff,

11 v.

12 Hardeep Singh Malhi, *et al.*,

13 Defendants.
14

No. CV-16-08055-PCT-JJT

ORDER

15 At issue is Plaintiff Judy Christoffersen's Motion for Sanctions and Default
16 Judgment (Doc. 59, Mot.), to which Defendants MD Trucking, Hardeep Singh Malhi, and
17 Karamjit Malhi filed a Response (Doc. 60, Resp.), and in support of which Plaintiff filed
18 a Reply (Doc. 61, Reply). The Court elects to resolve Plaintiff's Motion without oral
19 argument. *See* LRCiv 7.2(f).

20 **I. BACKGROUND**

21 Defendant Hardeep Singh Malhi was the sole owner of Defendant MD Trucking
22 and one of only two employees. On November 2, 2013, Mr. Malhi was driving a tractor-
23 trailer owned by MD Trucking and crashed into Plaintiff's vehicle. According to the
24 accident report, Defendants' truck collided with the rear portion of Plaintiff's vehicle,
25 which was estimated to be travelling 20 miles per hour below the speed limit. The car,
26 which was being driven by Plaintiff's husband, rolled repeatedly upon impact. Although
27 Mr. Christoffersen purportedly said he was fine after the accident, he was airlifted to the
28 nearest hospital.

1 On November 13 and 20, 2013, MD Trucking's insurance company, National
2 Casualty Company, sent letters acknowledging Plaintiff's injury claim to Plaintiff's
3 counsel. On November 16, 2013, Mr. Christoffersen died. On January 14, 2014, National
4 Casualty was informed of Mr. Christoffersen's death and communicated that information
5 to Mr. Malhi.

6 On January 24, 2014, Mr. Malhi transferred real estate holdings to his brother-in-
7 law. On February 3, 2014, Plaintiff sent Mr. Malhi and MD Trucking letters of
8 preservation by certified and First Class mail demanding they retain documents related to
9 the impending litigation. Although Plaintiff's counsel sent such letters to the correct
10 address, they were returned unclaimed. In June or July 2014, Mr. Malhi dissolved MD
11 Trucking and shredded and disposed of all of its records and files.

12 On October 23, 2015, Plaintiff filed her Complaint in the Superior Court of the
13 State of Arizona alleging negligence, negligence *per se*, negligent hiring and supervision,
14 statutory violations, and wrongful death. (Doc. 1 Ex. 1.) On March 21, 2016, Defendants
15 removed the action to this Court pursuant to 28 U.S.C. § 1441. (Doc. 1.)

16 In subsequent discovery, MD Trucking failed to provide any documents relating to
17 its business operations in any form. MD Trucking's only document production consisted
18 of a copy of the relevant insurance policy. However, in its written responses, MD
19 Trucking stated that it followed the Federal Motor Carrier Safety Regulations
20 ("FMCSR"). On the other hand, in his Rule 30(b)(6) deposition, Mr. Malhi stated that he
21 does not know what the FMCSR are, asked that they be explained, stated that MD
22 Trucking did not follow FMCSR hiring requirements, and was unable to assert
23 compliance with other FMCSR regulations.¹ Plaintiff then filed this Motion.

24 **II. LEGAL STANDARDS**

25 District courts may impose sanctions as part of their inherent power "to manage
26 their own affairs so as to achieve the orderly and expeditious disposition of cases."

27 ¹ The Court acknowledges that Mr. Malhi is not a native English speaker and
28 Defendants' argument that his deposition transcript may not accurately reflect his
testimony or the facts therein. (Resp. at 2.)

1 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see also Unigard Sec. Ins. Co. v.*
2 *Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (excluding evidence as
3 a sanction for spoliation). This power includes the “broad discretion to make . . .
4 evidentiary rulings conducive to the conduct of a fair and orderly trial.” *Unigard*, 982
5 F.2d at 368 (internal quotation and citation omitted).

6 The district courts’ inherent power to sanction may be invoked in response to
7 destruction of evidence. If a party breaches its duty to preserve evidence, the opposing
8 party may move the court to sanction the responsible party. *See Id.* at 365. At courts’
9 disposal are three methods of sanction. First, a court can instruct the jury that it may draw
10 an inference adverse to the party or witness responsible for destroying the evidence. *See*
11 *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). Second, a court can exclude
12 witness testimony regarding the destroyed evidence proffered by the responsible party.
13 *Id.* Finally, a court may dismiss the claim of the party responsible for destroying the
14 evidence or grant default judgment to the opposing party. *Allstate Ins. Co. v. Sunbeam*
15 *Corp.*, 53 F.3d 804, 806-07 (7th Cir. 1995); *see also Chambers*, 501 U.S. at 45 (“outright
16 dismissal . . . is a particularly severe sanction, yet is within the court’s discretion”);
17 *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982) (dismissal of claims is a
18 severe sanction and may be warranted for “outrageous” destruction of evidence); Fed. R.
19 Civ. P. 37(e) (“If electronically stored information that should have been preserved in the
20 anticipation or conduct of litigation is lost because a party failed to take reasonable steps
21 to preserve it . . . the court [may] dismiss the action or enter a default judgment”).

22 A party’s destruction of evidence need not be in “bad faith” to warrant a court’s
23 imposition of sanctions. *Glover*, 6 F.3d at 1329; *Unigard*, 982 F.2d at 368 n.2. District
24 courts may impose sanctions against a party that merely had notice that the destroyed
25 evidence was potentially relevant to litigation. *See Glover*, 6 F.3d at 1329; *Akiona v.*
26 *United States*, 938 F.2d 158, 161 (9th Cir. 1991). However, a party’s motive or degree of
27 fault in destroying evidence is relevant to what sanction, if any, is imposed. *Baliotis v.*
28 *McNeil*, 870 F. Supp. 1285, 1291 (M.D. Pa. 1994); *see also In re Napster, Inc. Copyright*

1 *Litig.*, 462 F. Supp. 2d 1060, 1078 (N.D. Cal. 2006) (the court should “impose the ‘least
2 onerous sanction’ given the extent of the offending party’s fault and the prejudice to the
3 opposing party”).

4 **III. ANALYSIS**

5 In resolving Plaintiff’s Motion, the Court is required to determine whether or not
6 Defendants had a duty to preserve the records that were destroyed and, if so, when. If the
7 Court determines that Defendants had a duty preserve, it must then decide what sanction
8 is appropriate for noncompliance. The Court will analyze each in turn.

9 **A. Duty to Preserve**

10 Before addressing each requested sanction, the Court must address Defendants’
11 duty to preserve the missing evidence. Plaintiff argues that the duty to preserve was
12 triggered on November 2, 2013, when the crash occurred. (Mot. at 11.) Plaintiff argues
13 that such notice—and thus, Defendants’ duty to preserve—was further bolstered by
14 Defendants’ insurance company’s letters sent on November 13 and 20, 2013; Defendants’
15 subsequent knowledge of Mr. Christoffersen’s death; and Plaintiff’s counsel’s attempts to
16 deliver notices of preservation on February 3, 2014. (Mot. at 11-12.) Defendants contend
17 that they were unaware of any pending claim when destroying the records and were
18 therefore under no duty to preserve them. (Resp. at 3-4.)

19 It is well established that the “duty to preserve arises when a party knows or
20 should know that certain evidence is relevant to pending or future litigation.” *Ashton v.*
21 *Knight Transp., Inc.*, 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011); *Morford v. Wal-Mart*
22 *Stores, Inc.*, No. 2:09-cv-02251-RLH-PAL, 2011 WL 635220, at *3 (D. Nev. Feb. 11,
23 2011) (the duty to preserve is triggered “not only during litigation, but also extends to the
24 period before litigation when a party should reasonably know that evidence may be
25 relevant to anticipated litigation”). The Ninth Circuit has not expressly defined the term
26 “anticipated litigation,” and trial courts have crafted various formulations of when a party
27 “should know” that the evidence may be relevant to future litigation. *In re Napster*, 462
28 F. Supp. 2d at 1068; *World Courier v. Barone*, No. C 06-3072 TEH, 2007 WL 1119196,

1 at *1 (N.D. Cal. Apr. 16, 2007); *Hynix Semiconductor Inc. v. Rambus, Inc.*, No. C-00-
2 20905 RMW, 2006 WL 565893, at *21, 24 (N.D. Cal. Jan. 5, 2006) (finding that
3 litigation became “probable” when counsel was selected), *overruled on other grounds, In*
4 *re Hitachi Television Optical Block Cases*, No. 08CV1746 DMS NLS, 2011 WL
5 3563781, at *1 (S.D. Cal. Aug. 12, 2011); *Ameripride Servs., Inc. v. Valley Indus. Serv.,*
6 *Inc.*, No. CIV S-00-113 LKK/JFM, 2006 WL 2308442, at *4 (E.D. Cal. Aug. 9, 2006)
7 (placing the anticipated litigation date to when a potential claim was identified).
8 Regardless of the precise terminology employed, courts recognize that once a potential
9 dispute matures to the point that litigation may well follow, relevant evidence should be
10 preserved.

11 In the current instance, it is unequivocal that Plaintiffs’ Complaint was not filed
12 until 15 to 18 months after Defendants dissolved MD Trucking and destroyed the records
13 associated with it. On the other hand, Defendants had uncontroverted knowledge of the
14 incident. Not only was Mr. Malhi the driver of the truck that struck Plaintiff’s vehicle, he
15 was the owner and operator of MD Trucking. Defendants received multiple notifications
16 from their insurance company regarding the injury claims and Mr. Christoffersen’s
17 eventual death. It is hard to imagine a set of circumstances—personal injury resulting in
18 loss of life—more likely to result in litigation. While Plaintiff sent multiple letters of
19 preservation to Defendants that went ultimately undelivered, the non-delivery of those
20 letters is suspicious. At any rate, the Court finds that Defendants had knowledge of a
21 potential claim and, regardless of any business acumen or lack thereof, should have
22 known that any records relating to MD Trucking may be relevant to that claim. Thus,
23 Defendants had a duty to preserve their record documents that was triggered prior to MD
24 Trucking’s dissolution and document destruction.

25 **B. Default Sanction**

26 Plaintiff argues that the destroyed records are necessary to establish alleged
27 violations of the FMCSR which are determinative to her negligence *per se* claims. (Mot.
28 at 8-9.) Plaintiff further contends that the records are necessary to prove her negligent

1 hiring, training, supervision, and retention claims and their destruction warrants default as
2 to those claims. (Mot. at 9-11.) Defendant responds that neither Rule 37(e)² of the
3 Federal Rules of Civil Procedure nor the Court’s inherent powers authorize sanctions
4 because Plaintiff failed to address the relevant factors, identify any prejudice, illustrate
5 the requisite *mens rea*, or demonstrate the relevancy of the destroyed documents. (Resp.
6 at 4-9.)

7 When considering a default sanction in response to spoliation of evidence, the
8 court must determine “(1) the public’s interest in expeditious resolution of litigation;
9 (2) the court’s need to manage its dockets; (3) the risk of prejudice to the party seeking
10 sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the
11 availability of less drastic sanctions.” *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d
12 1051, 1057 (9th Cir. 1998) (citation omitted). This multi-factor test is not “a mechanical
13 means of determining what discovery sanction is just,” but rather “a way for a district
14 judge to think about what to do.” *Id.*

15 The first two factors favor default judgment. Both the public and judicial interest
16 in expeditious resolution is affected by Defendants’ failure to preserve evidence, the
17 resulting delay caused by internal discovery disputes, circuitous efforts by Plaintiff to
18 confirm and otherwise obtain discovery, and the instant motion for sanctions. *See Leon*,
19 464 F.3d at 958 n.5. The third factor—prejudice—“looks to whether the spoliating
20 party’s actions impaired the non-spoliating party’s ability to go to trial or threatened to
21 interfere with the rightful decision of the case.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951,
22 959 (9th Cir. 2006) (citation and brackets omitted). It is apparent that Plaintiff has been
23 prejudiced by the spoliation of any and all records regarding MD Trucking’s operations,
24 both in regards to the relevant instance and otherwise, and the Court concludes that the
25 spoliation will force Plaintiff to rely on “incomplete and spotty” evidence at trial. *Leon*,
26 464 F.3d at 959 (quotation omitted). Although Defendants argue otherwise, the destroyed

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28 ² As Plaintiff notes, Rule 37(e) has been applied to all records, not just electronic
ones, as Defendants argue. *See, e.g., Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp.
2d 997, 1005 (D. Ariz. 2011).

1 records regarding compliance with regulations—such as those regarding daily driving
2 limits, truck and brake maintenance, and any other personnel or equipment issues—are
3 unequivocally relevant to Plaintiff’s claims. The fourth factor, as always, weighs against
4 a terminating sanction, as doing so precludes a resolution based on merit. As to the fifth
5 factor, and as discussed below, an adverse inference sanction is available in place of a
6 case-dispositive one.

7 Applying the five-factor test, the Court finds entry of default judgment to be too
8 drastic. *See Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 519 (finding
9 terminating sanction inappropriate where the spoliating party did not act in bad faith). It
10 is impossible to unequivocally state—as Defendants do—that the records are irrelevant to
11 Plaintiff’s claims, because those records have been destroyed. Neither Plaintiff nor the
12 Court can ascertain their ultimate relevance, whether it be inculpatory or exculpatory.
13 Thus, the Court acknowledges the prejudice caused by the lack of operational and
14 compliance records available to Plaintiff—particularly in terms of her negligence *per se*
15 claim, as well as those based in part or in whole on statutory compliance, or hiring and
16 supervision practices. However, the Court must also acknowledge the organizational
17 structure of MD Trucking. Mr. Malhi, who is a party to the action and available for both
18 deposition and evidentiary testimony, was the driver of the truck, owner of MD Trucking,
19 and one of only two MD Trucking employees. MD Trucking only owned one truck,
20 which was jointly driven with both employees taking shifts behind the wheel. By
21 analogy, Mr. Malhi was the Chief Executive, Operations, and Compliance Officer for
22 MD Trucking, as well as 50% of its employee base. His knowledge regarding MD
23 Trucking’s compliance with any statutory scheme, hiring practices, supervision duties,
24 and general operations can partially replace the very evidence that Plaintiff seeks. In sum,
25 the spoliation that occurred here does not foreclose a rightful determination of the matter
26 such that the drastic remedy of default is appropriate. However, because Plaintiff must
27 rely on incomplete and spotty evidence without the documents that were destroyed during
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1 MD Trucking's dissolution, the Court will move to considering lesser sanctions for that
2 harm.

3 **C. Adverse Inference Instruction**

4 Alternatively, Plaintiff requests an adverse inference jury instruction. (Mot. at 14.)
5 Defendants reiterate their arguments that Defendants did not have actual notice of a
6 potential claim and echo that the records are not relevant to Plaintiff's claims and
7 therefore cannot cause prejudice. (Resp. at 8-9.)

8 "When a party is prejudiced, but not irreparably, from the loss of evidence that
9 was destroyed with a high degree of culpability, a harsh but less extreme sanction than
10 dismissal or default is to permit the fact finder to presume that the destroyed evidence
11 was prejudicial." *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 617
12 (S.D. Tex. 2010). "[A] party seeking an adverse inference instruction based on the
13 destruction of evidence must establish (1) that the party having control over the evidence
14 had an obligation to preserve it at the time it was destroyed; (2) that the records were
15 destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant
16 to the party's claim or defense such that a reasonable trier of fact could find that it would
17 support that claim or defense." *Hamilton v. Signature Flight Support Corp.*, No. C 05-
18 0490, 2005 WL 3481423, at *3 (N.D. Cal. Dec. 20, 2005) (citation omitted). Having
19 already addressed factors one and three—and found for Plaintiff—the Court moves to
20 culpability.

21 "Courts have not been uniform in defining the level of culpability—be it
22 negligence, gross negligence, willfulness, or bad faith—that is required before sanctions
23 are appropriate for evidence destruction." *Ashton*, 772 F. Supp. 2d at 800 (citation
24 omitted). In the Ninth Circuit, "a party's destruction of evidence need not be in 'bad
25 faith' to warrant a court's imposition of sanctions." *In re Napster*, 462 F. Supp. 2d at
26 1066 (citing *Glover*, 6 F.3d at 1329). The Ninth Circuit has instructed that district courts
27 may impose sanctions against a spoliating party that merely had "simple notice of
28 'potential relevance to the litigation.'" *Glover*, 6 F.3d at 1329 (quoting *Akiona*, 938 F.2d

1 at 161). Nevertheless, “a party’s motive or degree of fault in destroying evidence is
2 relevant to what sanction, if any, is imposed.” *In re Napster*, 462 F. Supp. 2d at 1066–67.

3 The Ninth Circuit has also yet to clearly articulate the degree of culpability
4 necessary to warrant an adverse inference instruction. *S.E.C. v. Mercury Interactive LLC*,
5 No. 3:07-CV-02822-WHA, 2012 WL 3277165 at *10 (N.D. Cal. Aug. 9, 2012).
6 However, courts have found that an adverse inference instruction may be warranted
7 where the destruction was either willful or grossly negligent. *In re Napster*, 462 F. Supp.
8 2d at 1078; *see also Lewis v. Ryan*, 261 F.R.D. 513, 521 (S.D. Cal. 2009); *Karnazes v.*
9 *Cnty. of San Mateo*, No. C 09-0767 MMC (MEJ), 2010 WL 2672003, at *2 (N.D. Cal.
10 July 2, 2010) (“An adverse inference instruction may be appropriate where a party’s bad
11 faith or gross negligence has resulted in either the spoliation of evidence or failure to turn
12 over relevant evidence.”).

13 As discussed above, Defendants destroyed all MD Trucking-related documents
14 that they had a duty to preserve. Defendants, at the very least, should have known such
15 documents would be related to any subsequent claim, even if in their favor. The timing of
16 Defendant’s transfer of assets to his brother-in-law—within days after he learned of
17 Mr. Christoffersen’s death—is at least circumstantial evidence of Defendant’s awareness
18 of potential liability and intent to avoid it. Defendants’ conduct amounts to gross
19 negligence, if not willfulness, which is sufficient culpability to justify an adverse
20 inference. Therefore, the Court finds an adverse inference instruction to be warranted.
21 The parties shall submit proposed adverse inference instructions with the other jury
22 instructions to be filed before trial.

23 **D. Monetary Sanctions**

24 Plaintiff also requests an award of attorneys’ fees and costs incurred as a result of
25 Defendants’ alleged misconduct and in bringing the instant Motion. (Mot. at 14.)
26 Defendant responds that even if spoliation sanctions are applied, Plaintiff failed to
27 articulate any legal basis for awarding fees or show the requisite bad faith needed to
28 assess such fees. (Resp. at 10.)

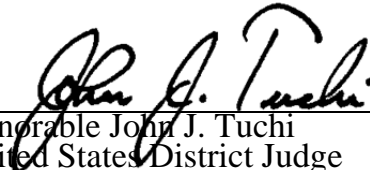
1 Monetary sanctions may be imposed where one party has wrongfully destroyed
2 evidence. *See, e.g., Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 558
3 (N.D. Cal. 1987). Plaintiff claims that she is entitled to her attorneys' fees associated with
4 bringing this Motion, but the Court finds that monetary sanctions are unwarranted here.
5 Plaintiff has not made a conclusive showing of bad faith and Defendants were
6 forthcoming regarding the lack of documents and did not otherwise forestall litigation or
7 delay discovery. Without any evidence of bad faith or a higher standard of knowing
8 culpability, the Court will deny Plaintiff's request for monetary sanctions.

9 **IV. CONCLUSION**

10 After receiving multiple notices regarding Plaintiff's injury claims and the severity
11 of the accident, Defendants should have known to preserve their records, even after
12 choosing to dissolve MD Trucking. Nonetheless, Plaintiff has failed to present evidence
13 that the destruction of records or the dissolution of the company were done in bad faith.
14 Without such evidence, Plaintiff's Motion for sanctions for spoliation of evidence will be
15 denied with respect to the requests for default judgment and monetary sanctions, but
16 granted as to the request for an adverse inference instruction.

17 **IT IS ORDERED** granting in part and denying in part Plaintiff Judy
18 Christoffersen's Motion for Sanctions and Default Judgment (Doc. 59). Plaintiff is not
19 entitled to default judgment or monetary sanctions but is entitled to an adverse inference
20 instruction at trial, which the parties shall propose at a later specified date.

21 Dated this 20th day of June, 2017.

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24 Honorable John J. Tuchi
United States District Judge
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